

Ram Parshotam Mittal v Portcullis Trustnet (Singapore) Pte Ltd and others
[2015] SGHCR 12

Case Number : Suit No 785 of 2011 (Summons No 568 of 2015)
Decision Date : 27 April 2015
Tribunal/Court : High Court
Coram : Paul Tan AR
Counsel Name(s) : Monica Chong (WongPartnership LLP) for the plaintiff; Edwin Soh and Harsharan Kaur (Drew & Napier LLC) for the defendants
Parties : Ram Parshotam Mittal — Portcullis Trustnet (Singapore) Pte Ltd and others

Civil Procedure – Discovery – Conflicts of Law – Comity

27 April 2015

Paul Tan AR:

1 This was an application by the Plaintiff for the Defendants to produce for inspection several categories of documents that have been listed in Part 2 of Schedule 1 of the Defendants’ List of Documents filed on 12 December 2014 and the attachment to the document listed at S/N 65 of Part 1 of the same Schedule (the “Requested Documents”). These are documents that the Defendants object to producing for inspection on the grounds that it would contravene section 149 of the Labuan Companies Act (“Section 149”) and breach a Labuan Order of Court made on 8 September 2014 pursuant to Section 149 (the “Labuan Order”).

2 Relevance of the documents was not disputed before me given that the documents have been included in Schedule 1 of the list of documents. Before me, the Defendants did not dispute necessity save for the cause papers filed in the Labuan proceedings. I heard parties on 18 March 2015 and delivered my oral grounds on 20 March 2015. I was of the view that production of the documents should be ordered. I now render my written grounds for my decision.

Background

3 The plaintiff is the shareholder of an Indian Company called HQR and the brother of Ashok Mittal with whom he is in dispute over the ownership and management of HQR in separate proceedings.

4 The 1st Defendant is a Singapore incorporated company and is part of the Portcullis Group. The 2nd Defendant is a Labuan-incorporated company which ceased to be part of the Portcullis Group from 30 January 2015. The 3rd Defendant is the Chairman of the Portcullis Group.

5 Cardiff (a Labuan company) and Hillcrest (a Malaysian Company and the wholly-owned subsidiary of Cardiff) were set up in 2003 as a corporate structure to route offshore funds to HQR. The single ordinary share in Cardiff was held by Portcullis Trust (Labuan) Sdn Bhd until 19 March 2004 when the share was transferred to the 2nd Defendant who continued to hold the share until 15 February 2015 when the 2nd Defendant retired as trustee of the sole Cardiff share.

Proceedings in Labuan

6 On 23 July 2013, the Defendants filed an application in the Labuan Court for leave to disclose documents relating to the business and affairs of the 2nd Defendant, Cardiff and Hillcrest for the purpose of the present Singapore proceedings. On 11 October 2013, the Labuan Court granted an interim order precluding the Defendants from disclosing documents relating to the business and affairs of the 2nd Defendant, Cardiff and/or Hillcrest for the present actions (the "Interim Labuan Order"). The Defendants' application was heard by the Labuan Court on 7 April 2014 and 7 May 2014 and dismissed on 20 May 2014, a subsequent appeal to the Malaysian Court of Appeal was dismissed on 13 February 2015.

7 During the trial of the suit commenced by Ashok Mittal against the Plaintiff and the Defendants in the Labuan Court, Ashok Mittal made an oral application for an order prevent the Defendants from disclosing to any party the details of Labuan proceedings commenced by:

- (a) Ashok Mittal against the Plaintiff and the Defendants; and
- (b) the 2nd Defendant against the Plaintiff and Ashok Mittal.

8 The Labuan Court granted the application which gave rise to the Labuan Order.

The Plaintiff's submissions

9 The Plaintiff's position was that inspection of the Requested Documents pursuant to O 24 r 11(2) of the Rules of Court should be ordered because the documents were relevant and necessary for the fair disposal of the present proceedings. The Plaintiff also submits that there was no evidence that the Defendants would be exposed to any risk of penal sanction under Labuan law even if they were to produce the Request Documents for inspection. The Plaintiff's Counsel highlights that while the Defendants' expert on Labuan law, Mr Rishwant Singh ("Mr Singh") states in his report that the Defendants would be exposed to criminal sanctions if inspection of Requested Documents is ordered, he has not actually seen the documents himself. Further, he has not indicated how the Requested Documents fall within the ambit of Section 149 or the Labuan Order.

10 The Plaintiff's Counsel points to the fact that in SUM 1595/2013 ("SUM 1595") and SUM 853/2014 (SUM 853), which were applications for production of documents and further and better particulars respectively, the same arguments were raised and rejected by the Court. Further, despite the Court ordering production of documents and the provision of further and better particulars, the Defendants have not been subject to any penal sanction.

11 The Plaintiff's Counsel argued that Section 149 and the Labuan Order are in fact irrelevant to the application at hand because the law that applies to proceedings is the *lex fori*, Singapore law and not Labuan law.

The Defendants' submissions

12 The Defendants' position is that the Court in considering whether to order production of documents for inspection should consider whether there was a real risk of penal sanctions. The Defendants' Counsel argued strenuously that the Requested Documents fell squarely within the ambit of Section 149 and the Labuan Order, thus the threat of penal sanctions was very real and would put the Defendants in a difficult position if production was ordered. The Defendants rely heavily on Mr Singh's expert opinion in this respect.

13 He further argued that the reason no penal sanctions have been visited on the Defendants following their compliance with the orders made in SUM 1595 and SUM 853 was because the documents produced and particulars pleaded were not as significant in scale as in the current application. It was also argued that at the time they were determined, the Labuan Court had not made the Labuan Order.

14 The Defendants argue that Section 149 and the Labuan Order were relevant because the Singapore Courts have held that foreign court orders must, as a matter of comity, be recognised, respected and given weight to, citing *The Reecon Wolf* [2012] 2 SLR 289 ("*The Reecon Wolf*") at [21].

15 The Defendants argued that the Singapore had no jurisdiction under Section 149 to order production of documents because the Labuan Court had decided that only the High Court of Malaysia and the High Court of Sabah and Sarawak were Courts of competent jurisdiction for the purpose of Section 149.

16 The Defendants also argue that production of the cause papers filed in the Labuan proceedings were not necessary for the fair disposal of the Singapore proceedings or in the alternative, should be produced only just before the parties exchange AEICs to prevent the Plaintiff from stealing a march on the Defendants.

My decision

17 As stated above, after hearing parties, I allowed the application, I ordered the Defendants to produce the Requested Documents for inspection by the Plaintiff and to allow the Plaintiff to take copies of the documents subject to the Plaintiff's undertaking that they be used only for the purposes of S 785/2011.

Necessity of the Labuan Cause Papers

18 I deal first with the issue of necessity of ordering production of the cause papers filed in the Labuan proceedings since if necessity is not made out, the issue of any breach of Section 149 or the Labuan Order need not be dealt with.

19 The law on production of documents is that where the documents are shown to be relevant, the Court may order the production of the documents for inspection only if it is necessary for the disposing fairly of the cause or matter or for saving costs (O 24 r 11 read with r 13(1)).

20 The Defendant's Counsel's submission is that the Plaintiff's request for the cause papers was nothing more than an attempt to preview the Defendant's evidence and there was no need for the Plaintiff to have the documents for the conduct of the case.

21 I was puzzled as to when the Defendants' Counsel then thought these documents should be produced if not now during discovery. It was the Defendants who disclosed these documents in Schedule 1 of their list of documents, indicating *prima facie* that they were of the view that these documents are relevant and necessary. Inspection comes as part and parcel of the discovery process.

22 This is not a case where the document has been referred to in the pleadings or an affidavit prior to general discovery and production of the document is sought or where the document is claimed to be privileged and the opposing party is seeking an order for the Court to inspect the document to determine if it is privileged.

23 The Defendants' Counsel submitted that if I was to order production, it should be just before the exchange of AEICs. I do not see any merit in that submission and note that it would result in the delay of the proceedings if the Plaintiff finds crucial pieces of evidence in the documents provided after the AEICs are ready for exchange. As such I am of the view that the cause papers are necessary for the fair disposal of the matter.

Section 149

24 I now turn to the issue of Section 149 and its applicability.

25 S 149(1) of the Labuan Companies Act provides that:

"(1) No person who has by any means access to any record, book, register, correspondence, document, material or information relating to the business and affairs of the Labuan company or foreign Labuan company shall give, reveal, publish or otherwise disclose to any person such record, book, register, correspondence, document, material or information."

26 It is the trite that the law governing the procedures applicable to court litigation is *lex fori*. As stated by Hoffmann J (as he then was) in *Mackinnon v Donaldson, Lufkin and Jenrette Securities Corporation & Ors* [1986] 1 Ch 482 ("*Mackinnon*") at 494-495, "if you join the game you must play according to the local rules. This applies not only to plaintiffs but also defendants who give notice of intention to defend."

27 This principle is further expounded by the Privy Council in *Peter John Brannigan & Ors v Sir Ronald Keith Davison* [1997] 1 AC 238 ("*Brannigan*"). In *Brannigan*, the plaintiffs were resisting an application to give evidence on the basis that to do so would be an offence under Cook Islands legislation and they were entitled under the privilege against self-incrimination to avoid giving evidence.

28 Lord Nicholls held that:

"If the privilege were applicable when the risk of prosecution is under the law of another country, the privilege would have the effect of according primacy to foreign law in all cases. Another country's decision on what conduct does or does not attract criminal or penal sanctions would rebound on the domestic court. The foreign law would override the domestic court's ability to conduct its proceedings in accordance with its own procedures and law. If an answer would tend to expose the witness to a real risk of prosecution under a foreign law then, whatever the nature of the activity proscribed by the foreign law, the witness would have an absolute right to refuse to answer the question, however important that answer might be for the purposes of the domestic court's proceedings.

This surely cannot be right. Different countries have their own interests to pursue. At times national interests conflict. In its simple, absolute unqualified form the privilege, established in a domestic law setting, cannot be extended to include foreign law without encroaching unacceptably upon the domestic country's legitimate interest in the conduct of its own judicial proceedings." (See *Brannigan* at 249-250)

29 Lord Nicholls' speech highlights the issues with allowing considerations of foreign laws primacy over the domestic court's procedural rules such that it would extend the reach of the foreign law and give it extra-territorial effect by allowing it to influence the domestic court's judicial proceedings.

30 The Plaintiff's solicitors have also pointed out that the English Courts have dealt with legislation similar to Section 149 in *Partenreederei M/s Heidberg & Anor v Gorvenor Grain and Feed Company Limited & Ors* [1993] I.L.Pr 718 ("*The Heidberg*") In *The Heidberg*, 2 defendants, UNCAC and GroupAma, sought to avoid their discovery obligations on the basis that to do so would infringe French law. The defendants asserted that as French companies they are prohibited under French law from complying with the English order to give discovery and compliance would result in a criminal offence in France. The English Court held that it was not persuaded by the evidence before it that there would be an offence by the defendants if they complied with the English discovery order and there was no risk of the defendants being charged with any criminal offence in France (*The Heidberg* at [36]).

31 The English Court reiterated that all matters of procedure are governed by the domestic law of the country to which the court where in any legal proceedings are taken belongs and affirmed Hoffmann J's holding in *Mackinnon*.

32 In *Christopher Morris v Banque Arabe et Internationale D'Investissement S.A.* [2001] I.L.Pr. 37 ("*Christopher Morris*"), Neuberger J (as he then was) was in a similar situation and ordered that discovery be ordered because to hold otherwise would very substantially interfere with the opposing party's pursuit of the case and clearly hamper the Court's ability to try the case fairly (*Christopher Morris* at [68]).

33 The purpose of the discovery process under O 24 of the Rules of Court is to ensure that the parties to the proceedings in Singapore and the Singapore Court have the relevant and necessary evidence in order to properly and fairly determine the issues. To allow Section 149 as a basis for the Defendants to withhold documents that are clearly relevant would extend the reach of the Labuan Companies Act such that it interferes with proceedings in the Singapore Court and hamper the Singapore Court's ability to dispose of the matter fairly.

34 Further, while the Defendants have adduced evidence on foreign law in the form of Mr Singh's expert opinion, I do not think much weight should be given to it.

35 During submissions, the Defendants' counsel in oral submissions before me stated that Mr Singh did not actual review the Requested Documents, the Defendants' Counsel not wanting to "belabour" the expert had conducted the review of the Requested Documents and produced the three categories set out at paragraph 53 of the Defendants' written submissions.

36 It was on these categories that Mr Singh then proceeded to give his expert's opinion. It was very telling that at paragraph 9 of his opinion Mr Singh stated he was instructed by the Defendants' Singapore solicitors that the Requested Documents consisted of, among other things, the categories of documents set out at paragraph 53 of the Defendants' written submissions. He then goes on to state that the documents in two categories fall within the ambit of the Labuan Order and that the last category of documents would fall within the ambit of Section 149 without stating providing any the reasoning for his conclusion. It would appear that Mr Singh expects the Court to simply take him at his word.

37 In *BNY Corporate Trustee Services Ltd v Celestial Nutrifoods Ltd* [2014] 4 SLR 331 ("*Celestial*"), the honourable Justice Prakash dealt with a similar situation. In *Celestial*, the former auditors were resisting providing documents pursuant to section 285 of the Companies Act (Cap 50), one of the arguments put forth by the auditors' solicitors was that to provide the documents would be to breach the State Secrets Law in China. However, Justice Prakash noted that the auditor's experts had not actually shown what state secrets were contained in the documents or how revealing them would be

against PRC law.

38 This appears to be the case here as well. Mr Singh has not stated how the documents relate to the business and affairs of a Labuan company or foreign Labuan company or how they would breach Section 149.

39 I would further question if Mr Singh is an appropriate person to give expert evidence and is in a position to be able to offer an entirely independent view given that he is at the same time the Defendants' solicitors in the Labuan proceedings.

40 It is trite that an expert's duty to the Court is enshrined in O 40A r 2 of the Rules of Court (See *Pacific Recreation Pte Ltd v S Y Technology Inc* [2008] 2 SLR(R) 491 at [69]). The reason for this is stated by the Court in *Vita Health Laboratories Pte Ltd v Pang Seng Meng* [2004] 4 SLR(R) 162 at [82]

"while an advocate may be as biased as he chooses to be in pressing his client's cause, an expert cannot adopt such a stance. An advocate is expected to articulate his client's views and cause without necessarily interposing his own views. An expert, on the other hand, should not evolve into a spokesperson for his client. Any opinions expressed must have a genuine foundation."

41 Given that Mr Singh is the Defendants' solicitor, I am of the view that the weight which the Court should accord Mr Singh's opinion should be adjusted accordingly. Further, as stated earlier, Mr Singh has not provided any grounds for his opinion.

42 It is also insufficient to simply show that there is a foreign law prohibiting disclosure of documents. In order for a party to avoid its discovery obligations, the party would also have to show that the threat to the party is real (See Paul Matthews and Hodge M Malek QC, *Disclosure* (Thomson Reuters (Legal) Limited, 4th Ed, 2012) at para 8.26).

43 Mr Singh has not provided me with any examples of where parties who have provided such documents under an order of Court have been prosecuted for the offence. The Defendants' Counsel point out that in the Labuan proceedings, the Plaintiff's brother Ashok Mittal had sought and obtained a declaration by the Court that the Plaintiff had breached Section 149. However, despite this the Plaintiff has not been charged with such an offence. It also bears noting that in SUM 1595 and SUM 853 which were heard before AR Teo Guan Kee and AR Edwin San respectively, the same argument that Section 149 prevents the Defendants from providing documents was run unsuccessfully. In particular, AR Teo ordered production of 8 documents. However, despite AR Teo ordering discovery and AR San ordering particulars which the Defendants asserted would breach Section 149, there have been no ramifications suffered by the Defendants.

44 Given the above, I find that the Defendants have not discharged their burden to show that the documents would fall within the ambit of Section 149 and further I am of the opinion that there is little or no risk of criminal sanctions should the Defendants be ordered to produce the requested documents.

The Labuan Order

45 Turning to the Labuan Order, I am of the opinion that the factors cited above apply as forcefully to the Labuan Order and given that the Labuan Order was derived from Section 149, I would reach the same conclusion. I note that while the Defendants' Counsel highlight that the Labuan Order was made only after SUM 1595 and SUM 853 had been determined, the Interim Labuan Order was

made before SUM 853 was determined and no consequences have been visited on the Defendants.

46 In addition, the Defendants' Counsel stressed that the Singapore Courts have accepted that foreign court orders must, as a matter of comity, be recognized, respected and given weight to, citing the decision of the honourable Justice Belinda Ang in *The Reecon Wolf* at [21]. I think the Defendants' Counsel have overstated the position and note that what the learned Judge actually held at [21] was

"The Singapore courts have acknowledged the importance of international comity, and in a proper case have given the doctrine due regard." (Emphasis added)

47 Justice Ang goes on to set out the meaning of comity at [23],

"23 "Comity" is defined in *Morguard Investments Ltd v De Savoye* [1990] 3 SCR 1077 at 1096 (and subsequently approved in *Amchem Products Incorporated v British Columbia (Workers' Compensation Board)* [1993] 1 SCR 897) ("*Amchem Products*") in the following terms:

'Comity' in the legal sense is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws ..."

48 The learned Judge, citing Andrew Phang JC (as he then was) in *Q & M Enterprises Sdn Bhd v Poh Kiat* [2005] 4 SLR(R) 494 at [25], highlighted that "*if giving accord to international comity offends the public policy of the domestic legal system (for example, Singapore), naturally the interest of the latter will prevail*".

49 Comity is not a magical word that once uttered would immediately cause the Singapore Court to bow to the decision of a foreign court. It is a balancing exercise where the Court has to consider on one hand the decision of a court of foreign jurisdiction and the other hand the interests in the proceedings over which it has jurisdiction. The question is whether comity is being weighed against simply something that is the convenience of a party or public policy.

50 In the present case, I have to weigh the interests of the Singapore Court and the parties to the proceedings in Singapore in having the relevant and necessary evidence before the Court in order fairly dispose of the matter against recognising the Labuan Order. I am of the view that to allow the Defendants to avoid their discovery obligations on the basis of the Labuan Court order would be to offend the public policy of ensuring that the Singapore Court has all the relevant and necessary evidence before it so that it can dispose of the matter fairly.

Conclusion

51 For the reasons above, I ordered the Defendants to produce the Requested Documents for inspection by the Plaintiff within seven days and to allow the Plaintiff to take copies on the undertaking to pay for the copies and that the documents would only be used for the purposes of the present suit.